



DEPARTMENT OF JUSTICE

STATEMENT

OF

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BEFORE THE

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
COMMITTEE ON FINANCIAL SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

COMPETITION IN REAL ESTATE BROKERAGE SERVICES

PRESENTED ON

JULY 25, 2006

Mr. Chairman and Members of the Subcommittee, I am pleased to be here on behalf of the Department of Justice Antitrust Division to discuss the competitive implications of developments taking place in the real estate brokerage marketplace.

With the number of U.S. homes sold annually now exceeding eight million, real estate brokerage fees affect millions of American consumers each year. The Government Accountability Office cited figures in its August 2005 Report on Real Estate Brokerage showing that consumers paid about \$61 billion in real estate brokerage fees in 2004. When this important industry does not function competitively, it can be very expensive for home buyers and sellers.

The Department of Justice is pursuing enforcement actions to protect competition and consumers in this industry against antitrust violations. And we are working to educate state governments about the competitive effects of rules governing brokerage services so that state officials are aware of any negative impact on consumers.

New Technology and Innovation in Services

New technology is one of the keys to more competitive real estate markets. In industries throughout our economy, the Internet has brought extraordinary new opportunities for increased competition, giving consumers better access to information about products and services and lowering costs and prices. In recent years, web-based business models have emerged in markets such as travel and lodging reservations,

stock and insurance purchases, and book and music sales, to name a few. New competition from these new business models has been good for consumers, resulting in increased choice, lower prices, and savings in personal time and effort.

New business models can offer the same kinds of benefits for buyers and sellers of real estate, in competition with traditional “brick and mortar” office brokerages in which customers interact only through individual brokers. For example, some brokers have begun providing information on homes for sale to their customers through the Internet. Using the Internet can allow web-savvy buyers to become educated about neighborhoods and examine suitable houses more efficiently than using a traditional broker. Home buyers can research neighborhoods and houses working on their personal computers, on their own schedule, and at their own pace, before spending time with an individual broker. This saves time brokers would otherwise spend searching through home listings or showing homes the buyer has not had the chance to explore more fully in advance.

Savings in broker time reduces costs for brokerages, which could translate into lower fees for brokerage services paid by consumers. Thus, by taking charge of some of the services traditionally provided by an individual broker, home buyers can reduce the number of services they buy and should expect to pay less in broker fees.

In real estate, the cost of providing brokerage services appears to have

decreased. But consumers are paying more. As the U.S. home sale price has climbed, the dollar amount paid for brokerage services has climbed right alongside it, because commission percentages have remained high. In fact, from 2000 to 2004, fees paid for brokerage services grew by roughly 50 percent, to over \$60 billion in 2004.

Joint DOJ/FTC Workshop on Real Estate Services

The Antitrust Division is working to build on our understanding of real estate markets, and why they may not be behaving as efficiently as they could, to aid our enforcement and competition advocacy efforts. Last October, we and the Federal Trade Commission held a joint workshop on competition issues in real estate brokerage. We invited state officials, economists, and other experts and market participants, including representatives of traditional brokers and brokers with Internet-based and other innovative business models.

The participants publicly debated the relevant issues, covering topics such as the structure of real estate transactions, use of multiple listing services, emergence of new and innovative business models, government and private restraints on real estate competition, minimum-service laws, legal prohibitions on offering rebates and other inducements to consumers, and empirical evidence on competition in the real estate industry.¹ The Division and FTC continue to study the information

¹ The transcript is available at http://www.usdoj.gov/atr/public/workshops/rew_transcript.pdf.

presented during the workshop, and plan to issue a report later this year.

The Antitrust Division's Competition Advocacy

One thing the workshop participants confirmed was that, as in other industries, laws and regulations in real estate brokerage can impede competition from innovative business models. Our experience in other industries has highlighted the negative effects government restraints can have on markets. Therefore, where it comes to our attention that significantly anticompetitive state laws or regulations are under consideration, we approach state officials to advocate that they take into account the benefits to consumers of a more competitive approach. Our experience analyzing competitive practices in a wide variety of markets often is useful in understanding the effects that state laws or regulations may have on competition and consumers.

The Antitrust Division has had a number of opportunities to offer states our pro-competition perspective on proposed measures affecting real estate services. For example, over the last decade, some states considered expanding the definition of “practice of law” so as to prevent non-lawyers from providing routine real estate closing services. Asked for our view, we have advised numerous state legislatures, courts, and bar associations as to the effects on consumers of prohibiting non-lawyers from providing these services.

Proponents of rules that would require hiring lawyers for residential real

estate closings argue that the lawyers are there to protect home buyers and sellers. But comparison studies find no greater incidence of consumer complaints in states that have allowed non-lawyers to provide these routine services, suggesting legal training is not needed to provide these services competently and reliably. Further, the facts show consumers benefit when non-lawyers are allowed into this market. Non-lawyers typically charge lower fees, and where lawyers must compete with brokers and others, the lawyers also charge less.

In more recent years, state authorities have been urged by some to adopt so-called “minimum services” rules, which would require that real estate brokers provide a certain minimum package of services. The traditional broker model provides virtually all nonlegal services associated with a home sale transaction, including those related to marketing, negotiating, and closing, in exchange for the broker’s percentage commission. Some consumers prefer to purchase fewer services, handling certain aspects themselves and paying less to brokers. In response to this consumer demand, new broker business models offer smaller packages of broker services, often on a menu basis, in exchange for a smaller total fee. Where this consumer choice is allowed, home sellers and buyers have been able to save thousands of dollars on individual home sales.

Some brokers are resisting these developments, encouraging their state

legislatures, regulators, or local real estate boards to impose restrictions that prevent any broker from offering less than a specified list of the “minimum services.” This is portrayed as protecting consumers from unwittingly agreeing to substandard service. But we have not found evidence of consumer confusion, so it appears that the effect of these restrictions is not to protect consumers, but to interfere with their freedom to choose, and pay for, only the services they want.

Over the last few years, the Antitrust Division, along with the FTC, has advised a number of states on the competitive implications of minimum service proposals. Last year, for example, we wrote to the Oklahoma Legislature about a proposed bill establishing a minimum services rule. After considering our comments and others’, the Legislature amended the proposal to retain more room for consumer choice.

Similarly, the Virginia Legislature took a more targeted approach to assertions of possible consumer confusion with limited brokerage service offerings. Their legislation, signed into law in April, only requires that brokers offering more limited services disclose in writing what services will and will not be provided. This leaves brokers free to choose which services to offer and leaves home buyers and sellers free to choose which services to purchase.

Just two weeks ago, the New Mexico Real Estate Commission announced it was

reconsidering some of its restrictive rules in light of concerns we had raised.

In other states, although not all states, with which we have shared our assessment, officials also have responded favorably, with results that benefit consumers.

The Antitrust Division recognizes and respects that state legislatures ultimately decide whether to adopt such restrictive measures. We believe state officials and their constituents benefit when these government officials have more information and can better consider the benefits to consumers from unrestricted competition.

Antitrust Division Enforcement Actions

Like government restrictions on competition, restraints imposed by market participants can harm competition and consumers, and of course such private conduct is fully subject to the antitrust laws. The Antitrust Division recently has brought two enforcement actions against restrictive real estate brokerage rules that violated Section 1 of the Sherman Act.

In March 2005, we filed a lawsuit against the Kentucky Real Estate Commission, which had imposed regulations prohibiting brokers from giving clients rebates on their commissions. There was no procompetitive justification for this rule, an obvious restriction on price competition. Indeed, the brokers themselves recognized the rule had just the effect they desired: that it was

“preventing the outbreak of a bidding war. It was preventing consumers from demanding things that would reduce broker profits.”

The Kentucky Real Estate Commission settled the case under a consent decree that permits brokers to offer rebates. Since then, real estate commissions in West Virginia and South Dakota likewise have decided to rescind regulatory bans on rebates, without the need for any enforcement action.

In September, the Division filed an antitrust action against the National Association of Realtors trade association (NAR), which had adopted nationwide rules that limit competition by real estate brokers using innovative business models and the Internet to offer better services to their customers.

The NAR rules, which apply to all of NAR’s local multiple listings services (MLS), discriminate against brokers that use the Internet to communicate to their customers the listing information about houses for sale in their locality. NAR’s so-called “opt out” rules allow traditional brokers to withhold their listings from the websites of these web-based brokers. There is no comparable restriction on brokers that communicate with customers in person, over the telephone, or otherwise. The opt-out restrictions prevent brokers using the Internet from providing to customers a full picture of the houses available in the community. The NAR rules undercut competition from this innovative business model,

discourage discounting, and limit consumer choice.

NAR's original opt-out rule allowed traditional brokers to single out individual web-based brokers for this discriminatory treatment. On the morning the U.S. lawsuit was filed, NAR announced a revised rule, under which traditional brokers can elect a "blanket opt out" and withhold their listings from all broker websites, but cannot choose to withhold listings only from selected web-based brokers. However, this revised rule specifically exempts from a blanket opt out NAR's own official website, Realtor.com; so in practice the opt-out rule targets only the web-based brokers. In our view, neither version of the rule has any procompetitive merit, and both violate the antitrust laws.

Also about the same time as we filed our lawsuit, NAR adopted a new, more restrictive MLS membership rule that excludes brokers that do not provide certain services to their customers. The membership rule change applies to new broker business models in which a brokerage may cooperate with other brokers to separately provide complementary services to common customers. Like the opt-out rule, the new membership rule restricts competition from non-traditional brokerages and, in our view, violates the antitrust laws.

The NAR lawsuit is pending in U.S. district court in Chicago.

Conclusion

Home ownership is a cornerstone of the “American dream.” Purchasing a home is the largest financial decision made by most families. But home sellers and home buyers are harmed when government or private restrictions on real estate broker competition prevent brokers from offering innovative services or adopting new, cost-saving practices. Therefore, the Antitrust Division will continue to use both law enforcement and competition advocacy tools to protect competition and consumers in real estate markets.

Thank you for the opportunity to testify. I would be happy to answer any questions.